

No. 45463-7-II

**IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION II**

AMERICAN EXPRESS CENTURION BANK

Respondent

V.

HEINZ HENGSTLER

Appellant

APPEAL FROM PIERCE COUNTY CASE NOS. 12-2-13342-1 & 12-2-
13343-9

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RESPONDENT'S BRIEF

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I. INTRODUCTION

This is a simple collection case in which the Appellant Heinz Hengstler (hereafter “Hengstler”), seeks to avoid paying two credit card debts that he incurred. Two separate cases were filed, one for each credit card account and Summary Judgment was entered in favor of American Express Centurion Bank (hereafter “American Express”) on each account. Hengstler did not submit a contradicting affidavit to the trial court in either case. Hengstler now appeals both judgments. The facts of these two cases are identical, and therefore the Court of Appeals has combined them for the purposes of this Appeal.

Hengstler now claims that the trial court erred in determining whether genuine issues of material fact existed in each case. As recognized by the trial court, American Express’s evidence clearly showed that Hengstler entered into a credit card agreement for each account with American Express and that Hengstler was liable for the debts that he incurred. As a result, judgments were entered against Hengstler. American Express respectfully requests that this Court affirm the summary judgments that were entered on September 13, 2013.

II. STATEMENT OF THE CASE

American Express issued two separate credit card accounts to Hengstler, which were the subject of two separate Pierce County Superior Court cases as described in detail below.

A. PIERCE COUNTY SUPERIOR COURT CASE NO. 12-2-13342-1

American Express issued a Senior Member Gold Card credit card account to Hengstler. CP 632-765. The Senior Member Gold Card had an account number ending in 01003. *Id.* Hengstler used this account to make purchases for goods and services. *Id.* Hengstler made consistent monthly payments on this account. CP 647-765. Hengstler eventually defaulted pursuant to the credit card agreement by ceasing to make payments on the credit card account, and Hengstler became indebted to American Express in the amount of \$6,180.66 for this account. CP 632-650.

As a result of the default, American Express initiated a lawsuit against Hengstler for this credit card account by serving him with a summons and complaint via personal service. CP 1-2. Hengstler filed a motion for summary judgment, which was denied by the trial court on March 22, 2013. CP 3-8, 154-155. American Express noted its own motion for summary judgment, and Hengstler filed an objection and motion to strike American Express's affidavit. CP 11-148, 149-150.

American Express struck its motion for summary judgment, and the trial court did not issue any ruling on either American Express's motion for summary judgment or Hengstler's motion to strike. Hengstler then filed a motion to dismiss, which was denied by the trial court on June 14, 2013. CP 156-158, 298-299. On June 11, 2013, American Express filed a motion for summary judgment that was supported by the affidavit of Richard Kier and multiple billing statements showing detailed and itemized usage of the account by Hengstler. CP 628-767. Mr. Kier is an authorized agent of American Express who stated that Hengstler owed a debt of \$6,180.66 to American Express for the credit card account ending in 01003. CP 632-635. Prior to Hengstler's default on the account, the billing statements show that throughout the life of the credit card account Hengstler made monthly payments. CP 648-765. The billing statements also show that Hengstler made consistent purchases for goods and services. Id. The credit card agreement and the billing statements demonstrate that American Express was the issuer of the Senior Member Gold Card. CP 638-765.

In response to American Express's motion for summary judgment, Hengstler filed an untimely response. CP 300-307. Instead of submitting an affidavit that set forth specific facts demonstrating a genuine issue for trial, as required by CR 56(e), Hengstler filed a response that contained nothing more than mere allegations. Id. Hengstler never submitted an

affidavit stating that he did not make charges on the credit card account; Hengstler never submitted an affidavit stating that he did not make payments on the credit card account; Hengstler never submitted an affidavit denying that he was the holder of the credit card account ending in 01003. Id. Hengstler did not provide any facts to contradict the evidence that was provided by American Express. Id.

B. PIERCE COUNTY SUPERIOR COURT CASE NO. 12-2-13343-9

American Express also issued an Optima Platinum Card credit card account to Hengstler. CP 482-593. The Optima Platinum Card had an account number ending in 71006. Id. Hengstler used this credit card account to make purchases for goods and services. Id. Hengstler made consistent monthly payments on this account. CP 498-593. Hengstler eventually defaulted pursuant to the credit card agreement by ceasing to make payments on the credit card account and Hengstler became indebted to American Express in the amount of \$25,411.39. CP 482-496.

As a result of the default, American Express initiated a lawsuit against Hengstler for this credit card account by serving him with a summons and complaint via personal service. CP 315-316. Hengstler filed a motion for summary judgment, which was denied by the trial court on March 1, 2013. CP 317-322, 349. American Express noted its own motion

for summary judgment, and Hengstler filed an objection and motion to strike American Express's affidavit. CP 350-466, 467-468. American Express struck its motion for summary judgment, and the trial court did not issue any ruling on either American Express's motion for summary judgment or Hengstler's motion to strike. Hengstler then filed a motion to dismiss, which was denied by the trial court on May 31, 2013. CP 469-471, 476-477. On June 11, 2013, American Express then filed a motion for summary judgment that was supported by the affidavit of Richard Kier and multiple billing statements showing detailed and itemized usage of the account by Hengstler. CP 478-595. Mr. Kier is an authorized agent of American Express, who stated that Hengstler owed a debt of \$25,411.39 to American Express for the credit card account ending in 71006. CP 482-485. Prior to Hengstler's default on the account, the billing statements show that throughout the life of the credit card account Hengstler made monthly payments. CP 498-593. The billing statements also show that Hengstler made consistent purchases for goods and services. *Id.* The credit card agreement and the billing statements demonstrate that American Express was the issuer of the Optima Platinum Card. CP 488-593.

In response to American Express's motion for summary judgment, Hengstler first requested a continuance, which was granted by the trial court on July 26, 2013. CP 596-567, 612. Hengstler then filed an untimely

response. CP 613-620. Instead of submitting an affidavit that set forth specific facts demonstrating a genuine issue for trial, as required by CR 56(e), Hengstler filed a response that contained nothing more than mere allegations. Id. Hengstler never submitted an affidavit stating that he did not make charges on the credit card account; Hengstler never submitted an affidavit stating that he did not make payments on the credit card account; Hengstler never submitted an affidavit denying that he was the holder of the credit card account ending in 71006. Id. Hengstler did not provide any facts to contradict the evidence that was provided by American Express. Id.

C. SUMMARY JUDGMENTS

On September 13, 2013, the Honorable Judge Jack Nevin heard argument on American Express's motions for summary judgment for both accounts and entered orders granting summary judgment in each case. CP 308-309, 621-622. Hengstler subsequently filed this appeal on October 10, 2013. CP 310-313, 623-626.

III. ARGUMENT

A. ISSUES ON APPEAL

Whether the trial court properly granted summary judgment.

B. STANDARD OF REVIEW

1. Granting of Summary Judgment

An appellate court engages in a *de novo* review of a ruling granting summary judgment, engaging in the same inquiry as the trial court. Lybbert v. Grant County, 141 Wn.2d 29, 34 (2000). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c), Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217 (1991). An appellate court may affirm an order granting summary judgment on any basis supported by the record. Truck Ins. Exchange v. Vanport Homes, Inc. 147 Wn.2d 751 (2002).

C. ANALYSIS

1. Summary Judgment Was Appropriate as a Matter of Law Because There Were No Genuine Issues of Material Fact.

Summary Judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of

law. CR 56(c). Pursuant to CR 56(e), an adverse party “may not rest upon the mere allegations or denials of his pleading, but his response, by *affidavits* or as otherwise provided in this Rule, must set forth *specific facts* showing that there is a genuine issue for trial.” CR 56(e) (emphasis added). Hengstler failed to provide any affidavits to set forth specific facts showing that there was a genuine issue for trial in either case. CP 300-307, 613-620. Instead, Hengstler merely made meritless legal arguments. Id. Hengstler did not submit an affidavit denying that he made purchases on either credit card account. Id. Hengstler did not submit an affidavit denying that he made payments on either credit card account. Id. Hengstler did not submit an affidavit explaining that the amounts owed were incorrect. Id. Hengstler did not submit an affidavit denying that he was the holder of either credit card account. Id.

In contrast, American Express’s motions for summary judgment were supported by two affidavits, one for each case. CP 632-635, 482-485. These were affidavits of Richard Kier, an assistant custodian of records of American Express, who stated that Hengstler opened each American Express credit card account, that Hengstler used each account to purchase goods and services, that Hengstler subsequently failed to make payments on the accounts, and that as a result Hengstler was in default on each account and owed a debt of \$6,180.66 for the Senior

Member Gold Card account ending in 01003, and \$25,411.39 for the Optima Platinum Card account ending in 71006. Id.

American Express's motions for summary judgment were also supported in each case by business records. CP 638-765, 488-593. The business records for each account include copies of the cardmember agreements and periodic billing statements showing detailed and itemized usage of each account including numerous purchases and payments. Id. The affidavits and business records submitted by American Express show that there was no genuine issue of material fact for trial in either case. CP 632-765, 482-593. Upon review of the documents and pleadings, reasonable minds cannot differ that Mr. Hengstler was issued two separate credit card accounts, used the accounts, and that there are balances that remain due and owing to American Express by Hengstler for each account. CP 628-767, 478-595. Hengstler did not provide the trial court with any evidence to contradict the evidence provided by American Express, as required by CR 56, therefore there were no issues of material fact and summary judgment in each case was appropriate.

2. Affidavits and Business Records of American Express are Proper under CR 56 and RCW 5.45.020.

Pursuant to CR 56, a motion for summary judgment is made through the use of supporting affidavits. The purpose of a summary judgment is to

avoid a useless trial. As such, the hearing is set so that the arguments are made upon a motion with supporting affidavits and documentation.

American Express included the affidavits of Richard Kier in its motions for summary judgment. CP 632-635, 482-485. Pursuant to CR 56(e), affidavits submitted as part of a summary judgment proceeding shall be made on personal knowledge that shall set forth such facts as would be admissible evidence showing affirmatively that the affiant is competent to testify what is in the affidavit. Mr. Kier's affidavits satisfy these requirements. Id. Mr. Kier states that he makes each affidavit based on personal knowledge or review of the business records of American Express. Id. Mr. Kier's affidavits set out that the records of American Express show Hengstler owes a balance due and owing to American Express for each account. Id. The affidavits affirmatively state that Mr. Kier is a custodian of records who is competent to make each affidavit. Id. Mr. Kier's affidavits are admissible under CR 56(e).

American Express's documents meet the Business Records Exception under RCW 5.45.020. The definition of a business record and the requirements for submission are set out in RCW 5.45.020:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the

sources of information, method and time of preparation were such as to justify its admission.

The custodian of records or other qualified witness must then testify to (1) the record's identity; (2) its mode of preparation; (3) if it was made in the regular course of business; and (4) if it was made at or near the time of the act, condition or event. RCW 5.45.020. Mr. Kier, as an employee, has knowledge of, and access to, relevant account information and records concerning the American Express accounts ending in 01003 and 71006. CP 632-635, 482-485. Mr. Kier swears that he is familiar with how the records are created and maintained by American Express, which include the business records provided with American Express's motions for summary judgment. CP 632-765, 482-593. Mr. Kier's affidavits satisfy the requirements of RCW 5.45.020.

3. Under Discover Bank v. Ray, Hengstler's Usage of each Credit Card Account is Proof of Hengstler's Assent to the Credit Card Agreements.

In Ray, the defendant claimed that without a copy of a signed agreement there was insufficient proof to show that the defendant assented to the credit card agreement. Discover Bank v. Ray, 139 Wn. App. 723, 725-726 (2007). The Court of Appeals Division III held that a credit cardholder accepted the terms of the cardmember agreement through the conduct of using the credit card, such that an enforceable contract was formed between

the cardholder and the issuer, where the cardmember agreement stated that the use of the credit card constituted an acceptance of the agreement. Here, on page three of American Express's cardmember agreement, a copy of which was included in each case with American Express's motions for summary judgment, under the section titled *About your Cardmember Agreement*, it states in the last sentence, "When you use the Account (or your sign or keep the card), you agree to the terms of the Agreement." CP 640, 490. It is axiomatic to credit card agreements that by use of a credit card, a cardholder incurs liability for the charges made. *Id.* at 727.

Hengstler has argued that American Express failed to provide proof of Hengstler's assent to the unsigned credit card agreement for each account. However, this argument fails under the Ray standard because there is uncontroverted evidence that Hengstler used each credit card account to make purchases for goods and services. CP 632-765, 482-593. Furthermore, Hengstler made consistent monthly payments until each account went into default. CP 638-765, 488-593. Therefore, by using each credit card account to make purchases for goods and services, Hengstler accepted the terms of the credit card agreement for each account.

4. Under Discover Bank v. Bridges and American Express Centurion Bank v. Stratman, American Express has Provided Proof of Hengstler's Personal Acknowledgment of the Accounts.

Hengstler alleges that American Express has not met the summary judgment standard. In Bridges, the Court of Appeals Division III ruled that the bank had to show that the defendant mutually assented to the credit card agreement and personally acknowledged the account. Discover Bank v. Bridges, 154 Wn. App. 722, 727 (2010). The court ruled that personal acknowledgement of the account could be proven through a signed agreement between the parties, through copies of checks or electronic payments, through detailed itemized proof of the card's usage, or through other evidence of the defendant's personal acknowledgement of the account. Id. at 727-728.

Recently, the Court of Appeals Division I decided American Express Centurion Bank v. Stratman, 172 Wn. App. 667 (2012), which upheld the entry of summary judgment and found that the case was distinguishable from Bridges because the account billing statements provided in Stratman listed specific information about the individual purchases and payments that were made on the account (e.g. the date of the purchase, the amount of the purchase, the name of the entity who provided the goods or services

purchased). At 674. Thus, this Court held that the billing statements in Stratman were enough to show personal acknowledgment of the account. Id.

Here, American Express has provided billing statements for each account from February 2011 through March 2012. CP 638-765, 488-593. The billing statements show purchases and payments made on each account from February 2011 until each account went into default. Id. The billing statements show detailed and itemized usage of each account by Hengstler. Id.

American Express has clearly shown that Hengstler personally acknowledged these credit card accounts, and thus that Hengstler assented to the terms of the credit card agreements for each account. American Express has provided detailed and itemized usage of the accounts by showing that Hengstler made purchases and payments. Id. Here, the Bridges standard has been met because American Express provided the listing of purchases and payments made on each account since February 2011. CP 638-765, 488-593. Because Hengstler did not provide any evidence to contradict the evidence provided by American Express, as required by CR 56, there were no issues of material fact and summary judgment was appropriate in both cases. American Express's motions for summary judgment were proper and should be affirmed.

5. Under the Account Stated Doctrine, Hengstler Assented to the Amounts Stated as Due and Owing.

Under the Account Stated Doctrine, the account stated is “a manifestation and assent by debtor and creditor to a stated sum as an accurate computation of an account due to the creditor.” Sunnyside Valley Irrigation Dist. v. Roza Irrigation Dist., 124 Wn.2d 312, 315 (1994) (quoting 2 Restatement (Second) of Contracts § 282(1), at 386 (1981)). One of the purposes of the Account Stated Doctrine is to permit the court to impute an agreement in the absence of an explicit agreement about the amount. Sunnyside, 124 Wn.2d at 317. While there must be some form of assent to the account, that assent may be implied from the circumstances and acts of the parties. Id. at 316 (quoting Shaw v. Logue, 58 Wash. 219, 221 (1910)). An account stated is an admission of the facts asserted and a promise by the debtor to pay those sums that are indicated. Sunnyside, 124 Wn.2d at 315.

American Express provided copies of billing statements for each account from February 2011 through March 2012. CP 648-765, 498-593. The billing statements show that throughout the life of each credit card account Hengstler made monthly payments to American Express up until default of each account. Id. Hengstler never objected to the amounts listed in the billing statements, instead Hengstler continued to make payments on

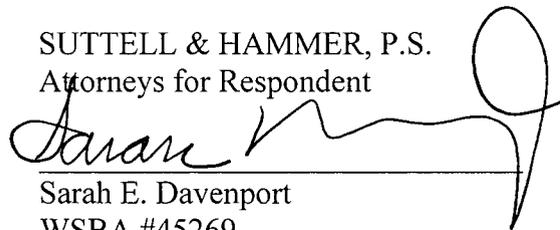
each account. By not objecting to the amounts listed on the billing statements, and by making payments on the accounts as stated in the billing statements, Hengstler assented to the stated sum in the billing statements as amounts due on each account to American Express.

IV. CONCLUSION

The trial court's orders of summary judgment in favor of American Express should be affirmed. Therefore, American Express respectfully requests that this Court affirm the judgments that were entered on September 13, 2013.

Dated this 15 day of May, 2014.

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WASHINGTON STATE COURT OF APPEALS, DIVISION II

AMERICAN EXPRESS CENTURION BANK	APPELLATE COURT
Respondent,	No. 45463-7-II
vs.	CERTIFICATE OF MAILING
HEINZ HENGSTLER,	
Appellant.	

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STATE OF WASHINGTON
BY [Signature] DEPUTY

The undersigned declares and states as follows:

I am a citizen of the United States of America, and of the State of Washington, over the age of twenty-one years, not a party to this proceeding and competent to be a witness herein.

On 5/15/2014, I sent a copy of the RESPONDENT'S BRIEF; CERTIFICATE OF MAILING in the above entitled action to:

HEINZ HENGSTLER
819 N 5TH ST, #104
Tacoma WA 98417

placing said documents in a sealed envelope with first class postage fully paid thereon.

Declarant states the foregoing is true and correct to the best of his knowledge and belief, subject to the penalty of perjury under the laws of the State of Washington.

DATED this 15th day of May, 2014, at Bellevue, Washington.

[Signature]
TuUyen Huynh